IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Public Integrity Alliance, Inc., an Arizona nonprofit corporation; et al.,

Plaintiffs,

vs.

City of Tucson, et al.,

Defendants.

CV-15-00138-TUC-CKJ

May 8, 2015
9:05 a.m.
Tucson, Arizona

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION FOR PRELIMINARY INJUNCTION AND TRIAL

BEFORE: THE HONORABLE CINDY K. JORGENSON, JUDGE

APPEARANCES

For the Plaintiffs:
Brownstein, Hyatt, Farber, Schreck LLP
By: KORY A. LANGHOFER, ESQ.
THOMAS J. BASILE, ESQ.
One East Washington Street, Suite 2400
Phoenix, Arizona 85004

For the Defendants:
Law Offices of Bosse Rollman & Funk, PC
By: RICHARD M. ROLLMAN ESQ.
3507 North Campbell Avenue, Suite 111
Tucson, Arizona 95719
Office of the Tucson City Attorney
By: DENNIS McLAUGHLIN, ESQ.
P.O. Box 27210
Tucson, Arizona 85726

Cheryl L. Cummings, RDR-CRR-RMR
Official Court Reporter
Evo A. DeConcini U.S. Courthouse
405 West Congress, Suite 1500
Tucson, Arizona 85701
(520)205-4290

Proceedings Reported by Stenographic Court Reporter
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P R O C E E D I N G S

(Call to order, 9:05 a.m.)

MR. LANGHOFER: Good morning, your Honor. Kory Langhofer and Tom Basile for the plaintiffs.

THE COURT: Good morning.

MR. LANGHOFER: In the gallery we have plaintiff Bruce Ash and Ken Smalley. And we also have in attendance, not a party but an interested party, Eric Spencer who is the State Elections Director, Secretary of State Michelle Reagan.

THE COURT: And certainly if your clients want to sit up here at counsel table with you they can. They don't have to, but we have extra chairs if they'd like to come up; or sit on the uncomfortable bench seats, whatever they'd like to do.

Good morning.

And for the defense.

MR. ROLLMAN: Good morning, your Honor. Richard Rollman for the defendants. With me today is my partner, Richard Brown, and Dennis McLaughlin from the City Attorney's Office. With the Court's indulgence, we would like to split the argument. Mr. McLaughlin will address the merits of the issues. I will address the remedy provision.

THE COURT: All right. Thank you.

MR. ROLLMAN: And, your Honor, in the courtroom today is Roger Randolph. He's a named defendant. He is the

Clerk of the City of Tucson.

THE COURT: All right. And since he is a named defendant, sir, if you like to come up. You certainly don't have to. It's completely up to you, sir.

Good morning.

All right. And I do appreciate the briefing on the rather quick time schedule that we have from both sides. I think there is an understanding, I know both sides talked with my law clerk indicating that today would be the time for hearing on both the preliminary injunction request as well as the permanent injunction. So basically, today is what we would call a trial even though I don't think any evidence is going to be presented.

So am I right on that, that there's really no dispute? We don't need to have any evidence or testimony presented to the Court about any particular issues?

MR. LANGHOFER: That's correct, your Honor. We have agreed on everything. I believe the defendants had one exhibit they wanted to offer, and we stipulate to the admission of that exhibit.

THE COURT: All right. And I think that was attached to one of the pleadings, so I don't think we have to have it marked separately.

MR. LANGHOFER: That's correct, your Honor.

THE COURT: Okay.

MR. ROLLMAN: Yes, we agree with that.

THE COURT: All right, Mr. Rollman. So we don't have any factual disputes. It's obviously interesting and important legal disputes.

And I do have some questions, but let me just go ahead and let plaintiff's counsel start. I don't want you to feel that you have to repeat everything that you've said in your pleadings, but just hit the high points for me.

My next hearing is at 11, but we certainly don't have to go until then if you feel like you've adequately covered everything in your briefs. If there's anything new you want to bring to my attention since the filing, you can certainly do that.

So go ahead, counsel. You can go ahead and get started.

MR. LANGHOFER: Thank you, your Honor. I do not plan to repeat what is in our briefs. I do want to touch on a couple of points, though.

Before getting to the legal theories, the abstract portion of the argument, I want to start with two very concrete facts.

The first fact -- and this is agreed to by the parties, it's not disputed -- the three members of city council who will be elected in 2015 represent all of the city of Tucson. They represent, among others, plaintiffs Ann

Holden and Ken Smalley who are here today. That's the first fact. They will be the representatives of these individuals.

THE COURT: And that's not disputed.

MR. LANGHOFER: My understanding is it is not.

THE COURT: Okay.

MR. LANGHOFER: The second fact, your Honor, is that without relief from this Court, plaintiffs Ann Holden and Ken Smalley and other individuals who don't reside in Wards 1, 2 or 4 will be absolutely denied the right to vote in the primary election for these individuals who are going to ultimately represent them on city council.

Those two facts, start with the concrete, those two facts are what we need to analyze the law. The law says if you reside in the geographic unit that is representing -- represented by the elected official, you have a right to participate in the general election and the primary election. That's Gray vs. Sanders, Bullock vs. Carter, Kramer vs. Union, but Gray I think is the most directly on point, the most instructive authority for us.

I want to talk about Gray by analogy. What happened in Gray was the primary election was weighted so that certain counties had more influence than other counties. That's very similar to what we have in the city of Tucson except that instead of giving lesser weight to outlying wards, the city of Tucson gives no weight to outlying wards. Only one ward gets

to choose the primary for every individual -- excuse me, every individual nominee. If the system in Gray was unconstitutional, how much more so must it be unconstitutional when we completely deny the right to vote to anyone not residing in the ward that's doing the nominating process?

THE COURT: So Gray, how is Gray factually different from our case?

MR. LANGHOFER: Gray is factually different in one way -- essentially different in many ways, but one way that might give rise to a legal argument. And that is over time, if we took, let's say, a fixed four-year time line instead of a two-year time line in the city of Tucson, all these constitutional arguments come out in the wash. Because as long as you stay in the same ward and you vote in every election, everyone in the city will have exerted the same fractional amount of influence on the city council. So that's the one argument that would distinguish Gray.

Now, we can come up -- if we tweak the facts in Gray, we could come up to something that would be analogous to this case. For example, if Gray, instead of being based on counties, said this year everyone in the primary with the last name beginning with the letter A through M or something that's 50 percent of the population, you guys get to vote in the primary. And then next time, N through Z, you get to vote in the primary. So that over a long enough time line, if

everyone stays -- keeps the same last name and keeps voting, everyone has the same amount of influence. Those facts wouldn't have that -- the factual discrepancy between the hypothetical and the city of Tucson that would permit the sort of argument.

Our position, of course, is whenever you cut out a part of the general election electorate based on their name or their ZIP Code or their ward, that gives rise to a violation of the Gray vs. Sanders' principle and the geographic unit being cohesive.

Your Honor, I want to speak for a moment, though, on precisely that issue. Whether over a long enough time line, if everyone ends up having the same amount of influence over the city council elections, we can countenance not full participation in any one election cycle.

I thought about this next sentence carefully, and this is not an overstatement I don't believe: There is not a single American case that adopts the view that constitutional violations can offset each other. So if we were to look at just this election, we would say to Ms. Holden and Mr. Smalley, yes, you are in fact denied the right to vote for the nomination of your representative, but we're going to make it up to you by making sure in the next election your neighbor's denied the right to vote. There is not a single case in American jurisprudence that takes a longitudinal view

of whether these rights can offset each other. It just doesn't happen. What we see from the Supreme Court and on down to the lower courts is we take election cycles one by one.

Now, there's a practical reason, of course, that that makes sense. First of all, if we were to think that the inequality of the election could be evened out over time, we would have to assume, wouldn't we, that people wouldn't move from the wards in which they're living. Or if they moved to a new ward, they moved to one in the same off-election cycle. We would have to assume that they stick around for an even number of elections. We have to assume they're indifferent to which primaries they're participating in.

Mr. Smalley might say, for example, Look, I know I'm in Ward 2, or Ward 3, what I really want, though, is to influence Ward 1. That's the election I really care about. That's the representative race that's hotly contested. It's close. I have strong feelings about one of the candidates. But if you're not indifferent to which ward you participate in, if you're not sure you're going to be in the city for an even number of election cycles and not move, this assumption doesn't make sense. Maybe those practical reasons are why we see the cases just do not adopt the longitudinal approach to washing out all inequalities over time.

Your Honor, I wanted to spend a little bit of time

on the remedies issue. I understand defense counsel will divide this argument up, and I don't mean to disrupt the flow of their thoughts.

THE COURT: That's fine.

MR. LANGHOFER: We start with the premise, I think, as the City does; that any time a Court is asked to use the federal Constitution to invalidate a local law, especially an important law like an election law, that's a very serious thing. And we shouldn't do that glibly. To make sure we're striking the right balance here, the plaintiffs are willing to support any -- a remedy that we could look at and all say that is the narrowest possible remedy. That would be the slightest intrusion of the judicial branch, the constitutional oversight into local affairs.

So what would that look like? Here's what we think makes sense.

First, the Court could find that this scheme does result in a deprivation of the right to vote for people who aren't participating in any given primary election. Footnote on that, the parties have really briefed this as a Fourteenth Amendment violation. Count Three is sort of the state law counterpart to the Fourteenth Amendment.

THE COURT: Right.

MR. LANGHOFER: We've agreed that the authorities are the same; the arguments are the same. If the Court wanted

to, it could rule under Count Three rather than Count One. But the arguments are identical, but we would just avoid a federal precedent.

THE COURT: So you agree Count Two is no longer really before the Court? Still there, but --

MR. LANGHOFER: We agree -- we can dismiss Count Two based on the stipulation that the city councilman represent the entire city. Count Two only matters if they had taken a position that they represent an individual ward.

THE COURT: And so your concern is that we have this hybrid system. If we have one system or the other, then you wouldn't be here representing the plaintiffs. Right?

MR. LANGHOFER: That's correct, your Honor.

THE COURT: You're saying we can't combine the two systems.

MR. LANGHOFER: That's correct. It needs to be all at large or all ward by ward, but the combination is what doesn't work.

Now --

THE COURT: Now, I'm just curious, how do we know that the folks that are elected represent the whole city? That must be written down somewhere. Maybe that's in the pleadings.

MR. LANGHOFER: So actually, it's an interesting question, your Honor. The Charter doesn't say that every city

council member represents every citizen of the city. The reasoning is as follows:

First of all, the parties agree on this, if it helps.

Second, the Arizona Supreme Court, in two cases back when it reviewed another issue in the city council election system, said that every city council member represents the entire city.

There's also the analysis in Gray vs. Sanders. So in Gray it didn't find that the elected representatives represented the county with the greatest weight. What it found was, look, the entire state represents them in the general election; therefore, their geographic unit is the entire state. That seems like the right analysis. If the general election is by the entire city here, we need to conclude that the geographic unit is the entire city.

THE COURT: And I interrupted. Go ahead with your remedy discussion. Go ahead.

MR. LANGHOFER: The first step we think would be to declare under the state or federal Constitution it's a violation.

The second step would be to settle on a remedy just for 2015. Not a permanent remedy. And the Court wouldn't have to inject its own subjective reasoning into that decision. We could ask the City which one they prefer.

Either choice would be constitutional. If the City can't conclude, our recommendation is certainly ward by ward. I can make an argument to you about that if you like, but for now I'd like to lay out the summary --

THE COURT: Go ahead.

MR. LANGHOFER: -- of the remedy.

The third step, then, would be to come up with a remedy that would last all time, 2017 and beyond. Again, there would be a way of doing this that avoids injecting the Court's own judgment into that system. For example, it could give the City the option of referring the issue to the people on the 2015 ballot. We could let the citizens of Tucson decide.

THE COURT: Has it been on the ballot, this issue? Just curious.

MR. LANGHOFER: Very similar issue has been on the ballot two times. It's never been said to the citizens, "We are changing the system, which one do you want: All ward or all at large?" But they have been asked two times: Once, "Would you like to go to at large?"; and once later they were asked, "Would you like to go to ward by ward?" Both times there wasn't a majority of the citizens, but they were never told the current system doesn't work, pick the alternative.

So the City of Tucson could refer the issue to the citizens. They could decide and the Court could, of course,

adopt the judgment of the citizens. If it's not referred to the citizens, the judge would have to decide and make -- decide which option is most consistent with the City Charter, the state Constitution, and the ideas of equal protection.

Let me say our peace on if your Honor is compelled to decide, if the City doesn't decide for itself. There are four reasons that I think going ward by ward only instead of having at-large elections make most sense.

First is that the City Charter obviously had in mind some sort of tie, ward-based tie from city council to individual wards. That's the idea of having ward-only elections. It didn't come out perfectly in the wash, but the idea is in there.

In the Arizona Constitution there's additionally the idea if you're elected from a district or some jurisdiction, you have to live within that jurisdiction. Again, the idea of local ties and elections is in the Arizona Constitution. Although to be fair, I think I should note that the Arizona Constitution has said it doesn't require at large or -- excuse me, the Arizona Supreme Court has said that the Arizona Constitution doesn't compel ward-by-ward elections or at-large elections. But the idea of local controlled elections is in this phrase in the constitution that requires candidate residency.

The third is that ward-by-ward elections are least

likely to drown out minority voices. It could be ethnic or racial voices, political voices, but ward-by-ward elections allow greater control for smaller fractions of the population.

The final reason we think ward by ward makes more sense is that the City apparently is concerned that although candidates haven't finished filing their paperwork for the 2015 election cycle, shifting at this point to an at-large system would be disruptive. We candidly disagree with that. But if it is a genuine concern on their part, we can solve that by not shifting for the primary election, keeping that ward by ward, and just making the general election ward by ward as well. Again, though, I think either ward by ward or at large would be constitutional sufficient.

Your Honor, I'm prepared to address any questions or concerns you have about the case, but those are the major points I wanted to speak to.

THE COURT: Now, how do you think the Court should -- strict scrutiny analysis or rational basis? And that's kind of -- depending on which way the Court goes, is that pretty much dispositive? I mean, if it's rational basis, do you agree the City has a rational basis for the system that it has in place? On the other hand, if it's a strict scrutiny analysis, maybe the Court might go the other way. Or do you think that's not an important distinction?

MR. LANGHOFER: I would be faking it if I said it

wasn't an important decision. We have an argument for rational basis, and I'll get to that in a moment, but I'd like to first explain why we think strict scrutiny is appropriate.

First, the Burdick vs. Takushi test from the Supreme Court says if there's a severe burden on a voting right -- severe burden on a voting right, we impose strict scrutiny. And if there's a reasonable and nondiscriminatory burden, by a rational basis.

So there's two cases after Burdick that unpack that for us. The first is Kramer vs. Union. Kramer held -- U.S. Supreme Court case -- where there's a deprivation or dilution of the right to vote, per se strict scrutiny. Squarely on point. We think that's all you need to look at. There's also a decision from the Ninth Circuit, Gray vs. City of Tucson. And there they found where there's a deprivation -- I got the holdings backward. The holding from Gray vs. Tucson was whether there was deprivation or dilution, per se strict scrutiny. Kramer said whenever you have a geographic unit and you exclude some people from that unit, you exclude them from the franchise, you apply strict scrutiny there. Both Kramer and City of Tucson unpack the Burdick test for us and show strict scrutiny is what's required here.

Our fallback position is this: If rational basis applies and if we're agreeing that every city council member represents the entire city, it is not rational to limit the

franchise to people within a certain geographic unit when we've already agreed they represent the entire city. The best case on that point is Hosford vs. Ray cited in the briefs. And I think that is the strongest argument we would have if the Court applies rational basis scrutiny.

THE COURT: What about is it Dusch? Is that how you pronounce it, D-u-s-c-h?

MR. LANGHOFER: Yes, your Honor.

THE COURT: What do you think about the Dusch case? I mean, that was an earlier case. Do you think that was using a strict scrutiny analysis or not?

MR. LANGHOFER: No, it did not use strict scrutiny. The Dusch case fits in a different line of cases about candidate residency requirements. And Dusch says expressly, look, if the residency was tied to voting privileges and not just candidacy, our analysis wouldn't be the same. It wouldn't follow. And Dusch says expressly, even though you have candidates or candidates living in certain parts of the geographic unit, in the end we all know they represent the entire geographic unit. So it wasn't concerned about making candidates living in one place or the other.

The footnote two in our reply brief addresses this issue, too. Whenever you've got limitations on what the candidate has to look like, it's a much less rigorous standard of review. There are durational residency requirements, for

example, for candidates that have been upheld by federal courts. You can't do that with voters. If you're a resident in the district, even if you moved there recently, as long as you established a domicile there you can vote. Candidate residency requirements, they're not strict scrutiny.

THE COURT: Now, what about the City of Tucson cites to some other communities that use the same model. I'm assuming that if there were cases where those models had been challenged, they've never been challenged as far as you know.

MR. LANGHOFER: No. We put a lot of time trying to find a precedence squarely on point.

THE COURT: The Court loves those kinds of precedence.

MR. LANGHOFER: The plaintiff does, too.

THE COURT: Especially from the Ninth Circuit.

MR. LANGHOFER: We cited to you what we think are the best authorities.

There have been other -- I think there were two other cases we found where a similar system, where you have ward-based, sub-unit based primary and at-large generals were invalidated, but they were not invalidated on federal Constitutional grounds or even state equal protection grounds. One of them was the California voting rights act. So there's certainly election-law-type regulations, but we don't think they're on point enough here to cite claims and authority.

THE COURT: What was the first, if you know, Supreme Court case that used the strict scrutiny/rational basis analysis in voting election cases?

MR. LANGHOFER: May I have a moment?

THE COURT: Was it after that Dusch case? If you don't know, that's fine. I'm just trying to see when the Court started using that particular analysis.

MR. LANGHOFER: Sorry for the caucusing, your Honor.

THE COURT: No, that's okay.

MR. LANGHOFER: And gratitude to opposing counsel for helping us through it, too.

THE COURT: Okay.

MR. LANGHOFER: Between Gray and Kramer, so that's 1963 to 1969, the Supreme Court settled on this framework. The earlier cases certainly had hints of it. I think U.S. -- strike that. Smith v. Alright has hints of it. But somewhere between Gray and Kramer, I think it's fair to say the Court settled its doctrine.

THE COURT: Thank you.

MR. LANGHOFER: Thank you, your Honor.

THE COURT: And let's see, Mr. McLaughlin, first. Good morning.

MR. McLAUGHLIN: Good morning, your Honor. Dennis McLaughlin for the City Attorney, and I'm going to do the merits. And we appreciate your letting us split the argument.

THE COURT: Sure.

MR. McLAUGHLIN: Your Honor, to answer a couple of your questions or try to, and I'll let you renew them if I don't, you had asked about the City's unitary government. And Charter Chapter 3, Section 1, this is at page 3 of our opposition, provides for a unitary mayor and council, but each member residing, and I'll read you what the provision says. It says, "The government of said city shall be vested in a mayor and council of six members, one from each ward. They shall be nominated, elected, and have such powers and duties as are provided by this Charter."

Then in Chapter 16, Section 9, council members are nominated by ward and elected at large. And it says, "Beginning in the year 1930 and continuing thereafter, the mayor shall be nominated from and elected by the voters of the city at large and the councilmen nominated each from and by the respective voters of the ward in which he resides and shall be elected by the voters of the city at large."

Now, no one disputes that because they're ultimately selected at large, that Tucson council members, although nominated by ward, represent the entire city. And Arizona Supreme Court has said that, too. They said that in City v. State which is from 2012. We cited that also.

THE COURT: So you would agree that Count Two is really not a viable count?

MR. McLAUGHLIN: Yes, we think Count Two --

THE COURT: Count One is what the Court needs -- and Three --

MR. McLAUGHLIN: Count One, Three, Four are the only ones. We don't think Count Two is really there anymore.

If I can just add, the Supreme Court in terms of this unitary government, in Fortson v. Dorsey which is cited in our opposition, and I'm paraphrasing because I have some brackets in here, but I'll say it in city terms: Each ward's council member must be a resident of that ward. But since his tenure depends upon the citywide electorate, he must be vigilant to serve the interests of all the people in the city and not merely those of the people in his ward. Thus, in fact, he is the city's and not merely the ward's, and I left in senator by mistake, should have said council member. And that's Fortson v. Dorsey.

THE COURT: Does it matter to me why the City chose this system?

MR. McLAUGHLIN: No, your Honor. We think it's rational basis test, and we think there is a rational basis. And it wouldn't even have to be the one that we thought up. You could think up whatever you want to think. If there's any basis, we win.

One correction, and I have no sense that this was an intentional mistake, I just want to clarify. It may not have

even been a mistake, but opposing counsel talked about who votes for whom. You do vote for the council member nomination in your ward so there is a vote that you do depending on where you reside every other election. And that's just one minor clarification to what he said about you don't vote for other council members.

Your Honor, he cited Gray v. Sanders. And our position, and I'll go through this in a little more detail, but Gray v. Sanders, the problem in Gray v. Sanders was it was a general election. I believe it was either statewide or districtwide. And the problem in Gray was certain counties and certain voters got more weight to their vote. The way Georgia set up their -- they had the county unit system. And the problem in Gray was that not everybody within the district was getting equal weight of vote. And it was a general election. I don't believe it was a primary election. I may be wrong on that. I will go -- the case says what it says. But that was the problem in Gray.

And that brings me to my -- I'm going to do a nutshell review for you of equal protection voting rights jurisprudence. I promise not to belabor this, and do interrupt me with questions.

There are basically three situations that can arise under equal protection voting rights.

The first one is you have a district so you've got a

box, and there are voters within that box. They all reside in the box. Their votes either aren't counted equally or certain voters are allowed to vote and certain others aren't. That's strict scrutiny and we don't dispute that.

In the City's case, all the voters in our general election citywide vote in the general election. And in our primaries that are held by ward, all the voters in the ward vote by ward. Two separate elections. We don't discriminate. We don't weight the votes differently. We say we can have two separate elections under equal protection voting rights jurisprudence.

THE COURT: And all the wards are treated the same?

MR. McLAUGHLIN: All the wards are treated the same, all the wards have equal population. Substantially equal. They acknowledged that in their pleadings.

THE COURT: Do you think that matters? Well, I don't need to know that, but I'm just curious.

MR. McLAUGHLIN: I think that it's good thing to have, let's put it that way. Because I think if there were unequal ward populations there could be other issues to this. But in one sense I don't think it does matter, in the sense of they are separate elections. But I'm just glad we don't have that as a distraction.

THE COURT: You don't need to explain that to me.

MR. McLAUGHLIN: Right. So let me give you a few

examples of the residents in the box unequally treated. Gray v. Sanders, their votes were unequally weighted depending on where they lived in the voting district, which I think was statewide in that case, and certain counties were favored over others and certain voters in those counties were favored over others. Strict scrutiny.

Kramer. Kramer, residents in the school district who were property owners, owners or lessees of taxable realty or their spouses, or parents or guardians of children could vote. Other residents of the district couldn't vote. They all reside in the district, but they can't -- certain of them can't vote. Strict scrutiny.

Carrington vs. Rash, Texas says if you're a military service member, you can never become a resident of Texas for purposes of voting. They were obviously trying to keep black service members from voting in the state elections. So whatever district you were in, even though you resided, you couldn't vote when other people could.

Last one and then I'll shut up on this. Evans v. Cornman, residents of a Maryland federal enclave were by definition stated not to be Maryland residents for voting purposes. They resided in Maryland, but they were told: You can't vote in Maryland because you're on a federal enclave. Again, discrimination between voters within the box. Standard and strict scrutiny.

Here's the second situation. Residents within the box, they're not told they can't vote or that their votes are going to be weighted differently, but there's some burden placed on their vote or so they allege. That's Burdick v. Takushi. That's what's called the immediate standard or the balancing standard. Would you like me to read that standard or --

THE COURT: Sure. Go ahead.

MR. McLAUGHLIN: A Court considering a state election law challenge must weigh the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against the precise interests put forward by the state as justification for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiffs's rights.

And I'll inject here. They were saying this in the context of not every burden on voting involved strict scrutiny.

Under this standard, a regulation must be narrowly drawn to advance a state interest of compelling importance only when it subjects to the voters' rights to severe restrictions. If it imposes only reasonable, nondiscriminatory restrictions upon those rights, the state's important regulatory interests are generally

sufficient to justify the restrictions. And in Burdick itself, I believe it was a Hawaii voter who said, "I can't do write-in voting. You don't let me do write-in voting." And they said not unconstitutional for them to bar write-in voting because they make it very easy to get on the ballot.

And Burdick is also interesting because it's clear from that that when you were dealing -- this was involving both primary and general elections. They said essentially the interests of the state can involve not simply the interest of the party, which is who the primary is theoretically for, but it can also be for the benefit of the public. And that's going to be important for our rational basis because we want to benefit the public in having ward nominations.

But I'm not saying Burdick applies. I'm saying Burdick talks about what can be a rational basis because neither Burdick nor the Kramer/Carrington line are applicable here. We do not have residents within the electoral box in either of these -- in the -- certainly in the ward election. In the citywide general election, everybody votes. Well, if everybody votes, there's no basis, very respectfully, for your Honor to be interfering in that election. So why are we talking about going to all districts? We certainly would oppose that. If there's anything that's going to happen, and we don't think anything ought to happen, the only possibility should be, well, citywide general, citywide primary. Not ward

by ward on both because there's no basis for you to interfere in the citywide general. Everybody is voting. But these are two separate elections.

THE COURT: Well, that's what I wanted to ask you. It's not one -- these are -- it's not one big election with two parts.

MR. McLAUGHLIN: Exactly.

THE COURT: It's two separate elections.

MR. McLAUGHLIN: Right. In fact, it's very much separate factually because by its nature the primary is a completely different election. It has a different electorate. It's all party members. And constitutionally, we couldn't form some hypothetical equivalent to a general election because we can't combine all the parties into one election. It's essentially every party having its own small election for the primary.

So it's different electorates. Different people are on the ballot. The only people that are on it are possible party nominees, not anyone else. And it's held at a different time. It's about ten weeks apart.

THE COURT: So the geographical unit for the primary and general elections don't have to be the same?

MR. McLAUGHLIN: That's definitely our position.

THE COURT: Okay.

MR. McLAUGHLIN: And --

THE COURT: What case do you think --

MR. McLAUGHLIN: There's --

THE COURT: -- most ably supports that?

MR. McLAUGHLIN: There's a series of cases that we cited in our opposition.

THE COURT: Okay. You can just tell me what page.

MR. McLAUGHLIN: Yeah, pages -- it's basically pages -- really, it starts on page 5, but the key ones you want are page 6.

THE COURT: All right.

MR. McLAUGHLIN: Line 5.

THE COURT: Yes.

MR. McLAUGHLIN: All the way to 6, line 25. And then on 7, 1 through 6, I tell you why our Charter is the equivalent of a state action to give us this power.

If I can, your Honor, if you'll just indulge me --

THE COURT: Take your time.

MR. McLAUGHLIN: -- two other cases that I want to say in addition. All of those cases say that. And in terms of the primary, I also would point you to the O'Toole case which is page 11. The key point is lines 14 through 17.

THE COURT: Yes.

MR. McLAUGHLIN: Where we talk about it provides the conditions under which the endorsement is to be received; in other words, the conditions under which the primary will

occur. And I note, we don't dispute that the primary is an election. I said that on page 11. But it's a separate election. And under the state's power to create districts for elections, it's a plenary power. It can be a different district.

And I'm going to get to the direct precedent in the Stokes case in a moment here, but did I answer your question?

THE COURT: Yes, thank you.

MR. McLAUGHLIN: Great.

Opposing counsel mentioned election cycles one by one. That phrase struck me. And I really think it's elections one by one. He wants to make the -- it one big election. We say it's the elections need to be treated one by one for purposes of the rational basis.

So what are we? We're not strict scrutiny. We're not the Burdick. We're situation three. We've created an electoral jurisdiction, in this case the primary wards. We have persons who aren't resident in the jurisdictions saying, You have to give us the right to vote in that election. We don't reside in it, but we want a right to vote in it. That's Holt/Herriman. That's the rational basis analytically. The Supreme Court has said that this one-person-one-vote or the strict scrutiny is never applied outside the boundaries of the electoral district that the state has created. And the state gets to create what that electoral district is if it has a

rational basis. And we do have a rational basis.

Now, this is a natural outgrowth of the City's power, and I cited you the cases. The qualification of its own voters for municipal offices and the nature of its machinery for the filling them, Oregon v. Mitchell; the manner in which officers are chosen, the Boyd case; when voting will be allowed and under what terms, Lassiter, McPherson, Pope, Carrington, Dunn; whether primaries occur at all, American Party of Texas; and the conditions under which they occur, O'Toole. So one way you can decide this case is analytically under Holt and under these cases.

Now, there's another way can you decide it and that is direct precedent. And the two cases I'm assuming you were able to -- and I do apologize that I didn't get these into our opposition, but I filed a notice of supplemental authority about the Stokes case and the Holshouser case.

THE COURT: Yes.

MR. McLAUGHLIN: Those are both cases from -- one is from '64 and one is from '71. They involve judges being nominated from respective circuits but elected statewide. And in Stokes they did exactly the analysis that you can follow and also serves as direct precedent.

Plaintiffs alleged a Fourteenth Amendment equal protection violation. The court was unable to discern any discrimination among voters or unequal weighting of votes of

the sort condemned by one-person-one-vote. So nothing to stay strict scrutiny. It analyzed the election separately. It found no discrimination in either the nomination or the election process considered separately. And the votes were equal in both elections. The votes of each person in the statewide election were equal. Statewide electors could vote for the nominees from each circuit. Exactly what happens in our general elections. And then the vote of each person in the judicial circuit was equal to the nominating process in the nominating process.

And the fact that the statewide could override the choice of the circuit, here they are citing that this can happen in the city elections, in no way offended one-person-one-vote. Rational basis was applied; a rational basis was found. The system accords a voice to both the residents of the circuit and the entire state. In other words, it affords proper recognition to the interests of all. Exactly what we're saying. There was no violation of the Fourteenth Amendment.

Holshouser v. Scott, I won't beat the dead horse, summarily affirmed by the Supreme Court which I'll get to a moment. Same analysis. And they actually may have gone off more on one-person-one-vote doesn't apply to the judiciary, but they quote the Stokes analysis and they do apply a rational basis test. And again, they find there's both local

and statewide interests that are being addressed here.

Now, these cases long predate -- well, not long, Holt and Herriman, they predate Holt which is '78. But they dovetail perfectly with this idea of a geographical limit that applies to different elections and that the state is free to impose. And that should apply to this situation and provide direct precedent.

THE COURT: What about this Dusch or Dusch?

MR. McLAUGHLIN: Dusch says -- that was a case where they had -- everybody was elected at large, but there was a residency requirement. And there's one quote in there that the opposing side uses that says, Well, it would be different if this was used somehow for voting.

But the concern on the voting there, the City says, was if you had a general election like the one in Gray, where you have districts of unequal population that are all voting for one member so you have unequal distribution of the weight of the votes, like a Gray v. Sanders' situation, or there's discrimination somehow that people aren't being allowed to vote who should be being allowed to vote -- in no sense were they saying you couldn't have a nomination that would feed into a general that was perfectly -- where both were perfectly legal.

We don't think that the concern in that case -- you already had an at-large and residency in the wards, which is

what we have. And we don't reduce -- or the Dallas County, I believe it was, case, it was a companion case to it, we don't read either of those as saying you can never have nominations by some other unit. They were saying we don't -- we don't like the idea that you would have a general, but there would be like county unit voting where there would be unequal voting or discrimination in the general election, because it's always the election. It's election by election.

Herriman, I cited to you in the opposition. And I cited to you certain things that were said in that case that were very useful here. How much leeway the states have in discriminating in different governmental units or electoral districts even when the outcome will affect the voters. And you recall in Holt the people were subject to Tuskaloosa policing, a lot of police authority. And the Supreme Court said it doesn't matter that may affect you. You're not within the -- within the voting district. You don't get to vote.

And Herriman said the same thing about the school district voters, that only certain school district voters were voting. We think the same applies to the idea of the primary. That the claim is, well, these people will eventually be elected and that may affect us. Well, the City is still able to say for the nomination, in order to have a rational contribution from the localities, we're going to have a different nomination process and that's not unconstitutional.

The State has a right to draw different boundaries for voting purposes, and we generally defer to these delineations as the Tenth Circuit as long as the separate units further reasonable government objectives. And here they do.

And finally, the Supreme Court has consistently upheld laws that give different constituencies different voices and elections. All of those apply here.

THE COURT: So do I need to hear about the reasonable government interest in setting up this particular type of election or not?

MR. McLAUGHLIN: I will be glad to tell you what we are -- our position on those interests.

THE COURT: Okay. And I'm sure that's covered in your --

MR. McLAUGHLIN: Page 4, line 16 of our opposition, leading up to --

THE COURT: So it promotes --

MR. McLAUGHLIN: -- 5, line 7.

THE COURT: Promotes the individual ward, it helps each ward to have better representation --

MR. McLAUGHLIN: Yes.

THE COURT: -- by ward? Is that the idea?

MR. McLAUGHLIN: Each party's ward -- each party's ward voters get to make their own choice of a nominee, and

that acts as a guarantee for the electorate also; that the nominee actually has support among the party members in the ward. And then the nominees compete in the general election only against other candidates from the ward. So it guarantees each ward has a local representative and, conversely, that the full mayor and council have members who are aware of each ward's problems and issues.

THE COURT: All right. Thank you.

MR. McLAUGHLIN: So let me just conclude the discussion before I go to my final point.

There's nothing whatsoever in the voter protection -- excuse me, equal protection voter rights jurisprudence that says what plaintiffs want to claim here. And you can say it about three different ways and they're all invalid.

One is you have to let me vote in the primary if you let me vote in the general. Not true. If you get to vote in one election, you automatically get to vote in another election. Not true. You analyze it on the basis of state power election by election. If the state creates a particular electoral district for the general election, the state has to use the exact, same district for its primary election. Not true. Fortson and Stokes -- excuse me, Stokes and Holshouser.

And I would note those are not one-person-one-vote cases strictly speaking because they weren't dealing with the

discrimination within the box. What they both were basically saying is if you have a statewide general, you have to have a statewide primary which is a little bit different. And I say that for a reason. A couple of reasons.

I want to just to look at New York State Board of Elections Lopez Torres and other of the cases that I cited in the supplemental authorities.

First, look at the facts of that case. Party voters in the legislative districts elect delegates. There's a convention. And they nominate people who are elected in a larger judicial district that comprises -- each judicial district comprises certain legislative district. And then all voters vote in the judicial district. So, in other words, they differ in size, they differ in jurisdictions for nomination and election. And in Lopez Torres there's even intervening convention that makes it more convoluted. The Supreme Court doesn't bat an eye.

If this claim that because we have a general of one district we have to have a primary of the same district is true, why didn't they bring that up in Lopez Torres? That's an obvious claim. They wanted a direct primary so why not claim that they get a direct primary in the same district? They never raise it. The case specifically says nothing to indicate that there needed to be a primary in the same size or delineation of district as used for the general.

Now, they also made -- taking it from the reverse angle, they made a specific legal point because the Republican party had the right to appear on the general election ballot through the state process -- and that's why we have Exhibit 1 for you because the same thing is true here in this case. They are a qualified party and their nominees will go on their general election ballot, and Exhibit 1 has the clerk saying that.

The state acquires legitimate governmental interests in assuring the fairness of the process, and that enables the state to proscribe what the process will be. So the Ninth Circuit adopts that concept in Alaskan Independence Party, which is another of the supplemental authorities. And in fact, they say that reasoning would survive any level of scrutiny including strict scrutiny. Now, I hasten to say we don't -- we know Lopez Torres was a First Amendment right of association case. I'm not saying it's direct precedent or it should be applied here, but it has these interesting points for your consideration.

Because the same principles apply under the Charter and the statutes, as I said, under Exhibit 1. They're eligible for our ballot based on the primary, so we get a say in how that primary is structured to the point where I don't think even under strict scrutiny they could argue it.

So why do I tell you all this? Well, they weren't

going to win under a First Amendment right of association case. That's why you're seeing this as an equal protection case. Our position is this is Lopez Torres. They want more influence. They want a different way that this process works. And they want to do it through an equal protection claim because they won't win it on a First Amendment claim.

And that leads me to the final broad or legal point that it makes, that I want to make you aware of. Which is when you read the Scalia opinion, he makes it clear that the federal courts are not going to get involved in these arguments over what is fair, what is just, what's the best system, what's going to give you, the individual voter or candidate, more influence. The federal courts decide constitutional issues and these are not constitutional issues. There's no equal protection claim in how we structure our primary and general election assuming we have a rational basis for the distinction that we're making. Certainly none that they are bringing here. And that should apply in this case under equal protection.

I would circle back to what was said in Luther v. Borden in the conclusion of our brief. It's not the federal court's job to say who's going to vote, to say who has a right to vote, who didn't, granting rights to vote that didn't exist under state law or restraining them when they do. Federal courts don't get involved with that.

So I think there are actually three ways to rule for the City. I told you two of them. One is the Holt analytical. Holt/Herriman. Second is Stokes/Holshouser, direct precedent. And the third related to the second, I believe, with the greatest respect to your Honor, that because Holshouser was summarily affirmed and because of the issues it raises, the summary affirmance binds you. And my two cases that I would ask you that read to see if you agree or disagree with me are Mandel vs. Bradley, 1977 Supreme Court, 432 U.S. 173 and it's at 176. And a case they referred to in that case is Hicks v. Miranda, 422 U.S. 332, and that's a 1975 case. So let me read you just briefly what they say in Hicks v. Miranda and then I'll turn it over to Mr. Rollman.

And obviously I'm -- there's only certain portions I'm telling you, but please read the whole thing. Hicks v. Miranda held that lower courts are bound by summary actions on the merits by this court. But we noted that ascertaining the reach and content of summary actions may itself present issues of real substance. Later they say: When we summarily affirm without opinion, we affirm the judgment but not necessarily the reasoning by which it was reached, which is, I think, significant particularly for Holshouser if you get into the one-person-one-vote for judicial office, which is maybe one the reasons that they decided the case.

But here's the key thing -- it actually works for us

here: Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.

Now, in Holshouser and Fortson, they raise the precise issue that plaintiffs are bringing here, which was if you have a statewide general election, if your general is districtwide, statewide in that case, then the primary has to be the same. It's either got to be all districts or all statewide. And in both of those cases, that specific issue was specifically rejected as an equal protection claim. And I think under Mandel and Hicks, that's a third string to the bow in terms of affirming or finding for the defendants in this case.

If you don't have any other questions, I'm sorry if that took a long time.

THE COURT: No, I appreciate the argument.

MR. McLAUGHLIN: I'll be glad to answer any questions or turn it over to Mr. Rollman.

THE COURT: No, thank you. That's fine.

So Mr. Rollman, come on up.

MR. ROLLMAN: Thank you, your Honor.

My portion of the discussion does not involve the difficult and sophisticated constitutional questions. It's on much more of a practical level.

The standards for issuance of an injunction actually are set for by the Ninth Circuit in a case that plaintiffs cited. It's the American Trucking case. And in the discussion portion, first paragraph of the discussion portion of that opinion, the Court notes that there are four standards.

Likelihood to succeed on the merits. That's a well-understood standard, but it's not enough by itself.

Irreparable injuries is the second standard, but that also is not enough by itself.

The third and the fourth requirements for an injunction are what are of interest to me this morning, and that is that the balance of equities tips in favor of the plaintiff; and that an injunction is in the public interest.

So how does the -- how do the equities and the public interest play out in this case? Well, to begin with, if one assumes that the present system is unconstitutional -- and I didn't come up here to argue that part. You already heard from Mr. McLaughlin on that point. But if one assumes that the system is unconstitutional, then as a practical matter, the Court cannot really direct the City itself to change it. The Court is going to ultimately have to make that

decision and pick one of these solutions or give the City an opportunity to allow the voters to change it.

Here's the reason: Mayor and council by themselves cannot change the manner in which primaries are conducted. That power is reserved by the Charter to the people. The people have put into the Charter the manner in which the primaries are to be conducted. Now, the Court can tell mayor and council that they need to refer to the people at the next general election a solution to this problem. That's possible. But that would delay a remedy this year. The remedy would be: Mayor and council, you're instructed to submit to the people a referendum.

THE COURT: And they have to pick one or the other.

MR. ROLLMAN: They could pick one or the other. As a practical matter, the way you have to write a referendum, it would be a "yes" or a "no." And you have to indicate the effect of a "no" vote and the effect of a "yes" vote. So it would be tough to give an either/or.

But here's how I think it would be work in real life: I suspect what would happen is mayor and council would indeed select one method. They would then refer it at the next general election. The way these things go is there would be a publicity pamphlet prepared. The publicity pamphlet would include arguments pro and arguments con to that particular solution. And then there would be sufficient time

allowed so that if interested parties in the electorate desired, they also could, by initiative, put another solution on the ballot. If there are competing solutions on the ballot, the solution that has the highest percentage "yes" vote would be the solution that would be adopted.

That would allow for the full public participation. It would allow for the full participation of the electorate. And it would implement the Charter process in the structure of the government. It would allow the government to govern. To have this Court interfere with that process would influence the result of the process.

You heard the argument that was presented to you today for ward-by-ward elections rather than an at-large election. It was a political argument. It spoke in terms of the benefit to one party as opposed to another party of a particular political structure, and it gave a number of reasons, and for many people those reasons will be very appealing.

For other people, I suggest, there are countervailing reasons. There are different political interests that are involved. There is an importance to having an at-large election of council members.

So the Court would have to take -- have to take a position on a political question, and the position it takes would be adopted by the side that favors that position, and

the Court would be used to influence the outcome of the election: This is what the Court has indicated is the most appropriate way; this is the solution that the Court has adopted.

That's not a position that the Court should want to be in. The Court should not be influencing the outcome of a political process.

Now practically, there's not time to conduct an election to change the Charter before the primary. It probably doesn't even require explanation. There's not an election before the primary. There's not time to schedule an election before the primary. There's not time to allow the debate that would be needed to allow public discussion, to allow the electorate to decide if individuals want to submit their own initiative, to gather signatures for an initiative. There wouldn't be time to really gather the pro and con arguments to be inserted into the publicity pamphlet. It can't be done.

So as a practical matter, the question -- if the Court determines that the current system is unconstitutional, the practical solution is to direct that a change be placed on the ballot in the next general election. Is this something that the Court has the authority to do? Absolutely.

Now, in one of the cases that we cited, it's the Charleston County case, United States v. Charleston County,

the district judge there found that the current system of at-large elections was violative of the Voting Rights Act, and so the court then had to consider whether or not to grant an injunctive relief. And in evaluating that, the court relied heavily on the earlier Fifth Circuit decision in Chisom v. Roemer which we've also cited in our papers. And they noted what I think is well-settled law, that intervention by the federal courts in state elections is serious business. It's not to be engaged in lightly.

And although the Court can use its power to correct a constitutional error, it needs to maintain a proper balance with the power given to local governments to allow local governments to govern. The conduct of elections is so essential to the self-determination and self-government of local elections that there's a strong public interest in having elections go forward even if there is a defect in that current election process. We suggest that that principle applies here. And I suggest that principle applies here because a decision that you make will effectively, if you adopt the ward by ward, disenfranchise significant number of voters in the city at the general election from participating in the election of council members.

There's six wards. Presently all city voters get to participate in that election. Should you enter an order saying that only residents of that ward can vote in that

election, you will have disenfranchised five-sixth of the city. Disenfranchising five-sixth of the voters is an extraordinary action.

If, on the other hand, you enter an order that says the primary must no longer conform with the Charter provisions, but instead the primary must be a general election, you may well alter the outcome of an election. You may well alter the outcome of people who wanted to participate in the election. You may well alter the results of that election because no longer will it be a decision made by the citizens and the voters of a particular ward, but a much larger group normally reserved only for the general election.

Either way you decide it, you are changing and altering the manner in which an election is conducted and, perhaps even, disenfranchising a huge number of voters.

Moreover, you're taking over a decision on how to structure the election that was decided upon in the Charter. And the decision to change that by Court fiat, rather than submitting it to the voters, will disenfranchise the voters from the opportunity to participate in the decision. And the Court's decision, even if it's just for one year, the Court's decision will undoubtedly become a point relied upon by one side of the debate in subsequent years when the decision is again put to the voters. So it's an important decision.

It is a process that has been in place since 1930.

And it appears to us that the equities and the public interest favor not disrupting what has been in place for so many years, and not disrupting the rights that have been given to the electorate to make these changes, and not disrupting the right of all the electorate to participate in elections. But it seems to us that the logical basis and the logical and proper decision, if the Court finds that it must do something about this, is to direct that something be done and it be done in an appropriate way consistent with the structure of local government. And that is to direct mayor and council to submit a referendum in a timely way at the next general election.

Your Honor, that concludes my remarks unless you have any questions.

THE COURT: No. Thank you, Mr. Rollman.

And rebuttal.

MR. LANGHOFER: Thank you, your Honor. I don't have a great number of points.

THE COURT: I usually say brief rebuttal. So go ahead.

MR. LANGHOFER: I'll do my best.

THE COURT: Any points you'd like to respond to.

MR. LANGHOFER: Two quick observations.

First, Gray v. Sanders involved a primary election and not a general election. I think opposing counsel mentioned he was uncertain of that at the podium, but it was a

primary.

Second is, if strict scrutiny is what applies here, the City has not made an argument that the Charter is justified by compelling state interest and narrowly tailored to advance the interest. I have not heard a merits-based defense if the standard of review is strict scrutiny.

Now, the one good point on the merits before we turn to the remedy is the idea that the geographical units for the general election could be different from the geographical unit for the primary election. It's another way of saying it's two separate elections. Our view is it's just wrong. If that is correct, what would stop the City from saying that the primary election for the mayor, for example, will be residents on this particular street. What would stop that? It's a different election. Everyone on that street in the primary election would be treated equally. Everybody outside would be disenfranchised. It's plainly unconstitutional. You can't do that.

What would stop the state representatives -- state House of Representatives and Senate from saying primary elections for the United States senator represent the entire state, the general election would be statewide. But for the junior senator we'll have Congressional Districts 1 through 4 do the primary, and for the senior senator, 5 through 9. More or less equal. What would keep that from being

unconstitutional?

This principle that you can vary the geographic unit for the general election and the primary election is a radical principle that would allow extreme disenfranchisement of people in the state and the city. No court has ever adopted that view with a couple of exceptions I want to address head on.

There's the judicial cases, the two that opposing counsel talked about. They are Stokes and Holshouser. Both of those cases were similar facts with one important distinction. There they involved judicial candidates and not representatives who formed general policy for the geographic unit. Both of those decisions said squarely: Look, the Fourteenth Amendment doesn't apply to judicial elections. Your Honor doesn't represent someone here. Your Honor applies the constitution. Judges everywhere are called upon to apply the constitution because you're not representatives. There's no one-man-one-vote concerns they held in your election. Now, they did go on to say in dicta that even if it applied, it wouldn't be a violation; but it was plainly dicta. The principle that judicial elections aren't governed by one-man-one-vote is obvious.

Also, let's think about what those cases are. They are two cases from more than 40 years ago, that are from lower courts. One summarily affirmed. We had the discussion about

what that means. I don't need to repeat it. And they both predate Bullock v. Carter. In our view, Bullock v. Carter is the seminal case on the idea that the primary election is entitled to full equal protection clause protections. There's been some discussion in some previous cases, but both those judicial decisions predate Bullock and puts to bed any argument that primary elections aren't fully protected constitutionally.

Now, so there are additionally, in addition to the two judicial cases, a couple of other cases cited in the opposing brief and discussed here at the podium. I don't think we need to discuss this in detail. Your Honor can see them for yourself, but I do want to make a point. Those are very old cases. The other cases, apart from the judicial ones, the countenance and arrangement like that, are exceedingly old. One is from 1916. One mentioned at the podium literally predates the Fourteenth Amendment. Literally, there were slaves in the United States of America when that case was being decided. The idea that the primary election can be -- the geographic unit can be different, you can have a street, for example, nominating the mayor, that just cannot be squared with modern, equal protection jurisprudence.

So what do we have to look at? I want to have a very small quote here from Gray vs. Sanders. This is word for

word from the decision. "Once the geographical unit for which the representative is to be chosen is designated," here we have agreed that's the City, "all who participate in the election are to have an equal vote, whatever their race," I'll skip some words here, "and wherever their home may be in that geographical unit."

I think it's extremely difficult to argue that two judicial decisions to which the Fourteenth Amendment does not apply is more persuasive than this language directly from the United States Supreme Court in Gray vs. Sanders.

Now, your Honor, on the issue of remedy, a couple of passing remarks.

First, the four-part standard for preliminary injunctions from Winter and American Trucking shouldn't apply here. We're past the PI stage. We're at the trial on the merits. So if we're correct about the violation, there has to be some remedy without discussing irreparable injury and the normal foilments that we have under the Winter test.

Second point is that the City acknowledges if there's going to be a remedy, the Court could put on the -- could direct the city council and the mayor to put on the ballot a referendum. And I want to think through carefully the mechanics of that. The city council doesn't have the authority to say we are changing the Charter. They have the option of referring the option of a Charter amendment to the

city voters. But they don't get to say we're changing it, which change do you prefer? Constitutionally, I don't believe they have that power.

So to give effect to claim the City has talked about, I think what we could do mechanically is the Court could say pending any referendum, we will have ward-by-ward elections. I would really like for the City to put on the ballot the idea of if they'd like to go to at-large elections they can. But the City itself does not have the power without order of the Court to force the voters to adopt a change to the Charter. I hope that concept is clear.

So what the referendum could do is amend the Charter to something that's constitutional; for example, at-large election. But in the interim there would have to be -- you have to have some way of forcing the change, and I think the order of the Court could do that recognizing the voters may fix it on their own.

There's finally the argument that if the Court does anything for the 2015 election, you would have half the city without a representative on city council, so the remedy would result in a disenfranchisement. And if we think about how that plays out over time, the same argument can be made election cycle after election cycle. If the Court can't remedy it now, in 2017 we could be back before you and say the same thing. Well, look, everyone -- if the other wards that

are not having elections now, primary elections now, are forced to do ward-only then, word-only all the way through the general election, then half the city we're talking about now would have no representative on the city council for the next two years. You could make this argument every election cycle and therefore perpetuate disenfranchisement ad infinitum. There's nothing to repeat them from repeating the same argument next time.

So what it boils down to, because there has historically been a deprivation of the right to vote, we have to make sure, so everything is fair, we keep depriving the right to vote out into eternity. That just doesn't plainly work.

Here's what we can reasonably disagree about. Without a remedy from this Court, individuals like Ken Smalley and Ann Holden, the plaintiffs in this case, and literally hundreds of thousands of other people in the city will be represented on -- they will have representatives elected at this election and they will be categorically denied the right to vote in the nomination process for those people. That is a concrete fact. And to fix that, to fix collective disenfranchisement of hundreds of thousands of people, this Court -- you cannot have an equal protection of that scope for this duration that lacks any remedy of law.

Thank you.

THE COURT: Thank you, counsel.

And I appreciate the oral argument and the thorough briefing. I know that obviously timing is an important factor here with all of the deadlines that have been outlined particularly by the City. So I will make my best efforts to rule promptly. I'm not going to tell you specifically a particular day.

So if there's nothing further, then, I thank both sides and we'll stand at recess in this matter.

MR. LANGHOFER: Thank you, your Honor.

MR. McLAUGHLIN: Thank you, your Honor.

(Proceedings concluded at 10:20 a.m.)

C E R T I F I C A T E

I, Cheryl L. Cummings, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 24th day of June, 2015.

/s/Cheryl L. Cummings

Cheryl L. Cummings, RDR-CRR-RMR
Federal Official Court Reporter